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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1969

No. [redacted] 78

YAM SANG KWAI,

Petitioner

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No.

YAM SANG KWAI,

Petitioner

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit which sustained a final order of deportation of the Board of Immigration Appeals.

OPINION BELOW

The opinion of the Court of Appeals was rendered on February 17, 1969 and is unreported. The opinion is set forth in Appendix A herein.

JURISDICTION

The judgment of the Court of Appeals was entered on February 17, 1969 (App. B). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether judicial review of a final order of deportation under 8 U.S.C. 1105(a) authorizes *de novo* findings of fact by the Court of Appeals which are not supported by the record nor by any prior administrative determinations.

2. Whether 8 U.S.C. 1357 authorizes four immigration officials (later joined by two more) to surround all exits of a small carry-out restaurant and detain the owner-operator therein for questioning without a warrant of arrest where such officials have no advance information that such owner-operator is an alien, that he is here illegally or that he might abscond. Is such procedure authorized by *Terry v. Ohio*, 392 U.S. 1 (1968)?

3. Whether the arrest of petitioner without a warrant was accomplished when his small carry-out restaurant was surrounded and exits blocked by immigration officials to prevent his escape. Is such an arrest accomplished under *Terry v. Ohio*, 392 U.S. 1 (1968) where the record fails to disclose whether he knew that the restaurant was surrounded? Does the absence of record information or an administrative determination as to his knowledge that the restaurant was surrounded, justify a *de novo* Court of Appeals finding that he lacked such knowledge?

4. Whether 8 U.S.C. 1357(a)(1) and the principles enunciated in *Terry v. Ohio*, 392 U.S. 1 (1968) authorize the detention of an alien for interrogation in his own restaurant without a warrant and without probable cause.

5. Whether the arresting immigration officers herein had probable cause to arrest without a warrant under 8 U.S.C. 1357(a)(2) upon the basis of a conclusion that petitioner

was an alien illegally here who might abscond. Whether the deportation order herein founded upon information secured from petitioner prior to service of a warrant of arrest was based upon tainted evidence secured in violation of the Fourth Amendment.

6. Whether the deportation order herein and notice of charges based upon an entry at Philadelphia, Pa. on September 20, 1966 conforms to due process where there was no such entry on such date and where the only record evidence shows an entry in New York City on September 26, 1966.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The Fourth Amendment to the United States Constitution provides in part:

> "The right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures shall not be violated and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly, describing the place to be searched and the persons or things to be seized."

The Fifth Amendment to the United States Constitution provides in part:

> "No person shall * * * be deprived of life, liberty, or property, without due process of law. * * *"

Section 106(a)(4) of the Immigration and Nationality Act [8 U.S.C. 1105(a)(4)] provides in part:

> "* * * except as provided in Clause B of paragraph 5 of this subsection [nationality issues] the petition [for review of final orders of deportation] shall be determined upon the administrative record upon which the deportation order is based and the Attorney General's findings of fact, if supported by reasonable, substantial, and probative evidence on the record considered as a whole, shall be conclusive."

Section 242(b) of the Immigration and Nationality Act [8 U.S.C. 1252(b)] provides in part:

> "Proceedings before a special inquiry officer acting under the provisions of this section shall be in accordance with such regulations not inconsistent with this Act, as the Attorney General shall prescribe. Such regulations shall include requirements that–
>
> "(1) The alien shall be given notice, reasonable under all the circumstances, of the nature of the charges against him and of the time and place at which the proceedings will be held; * * *"

Section 287 of the Immigration and Nationality Act [8 U.S.C. 1357] provides in part:

> "(a) Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant–
>
> "(1) to interrogate any alien or person believed to be an alien as to his right to be or remain in the United States;
>
> "(2) to arrest any alien who in his presence is entering or attempting to enter the United States in violation of any law or regulation made in pursuance of law regulating the admission, exclusion, or expulsion of aliens, or to arrest any alien in the United States, if he has reasons to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest, but the alien arrested shall be taken without unnecessary delay before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States."

8 C.F.R. 287.3 (1968 Ed.) provides in part:

> "An alien arrested without a warrant under the authority contained in section 287(a)(2) of the Immigration and Nationality Act shall be examined as therein provided by an officer other than the arresting officer * * *. If such examining officer is satisfied that there is prima facie evidence establishing that the

arrested alien was entering or attempting to enter the United States in violation of the immigration laws, he shall refer the case to a special inquiry officer for further inquiry in accordance with Parts 235 or 236 of this Chapter or take whatever other action may be appropriate or required under the law or other regulations applicable to the particular case."

STATEMENT

On the evening of October 12, 1967, at about 6:00 p.m., four immigration officers (later joined by two or more) surrounded a small carry-out Chinese restaurant owned and operated by petitioner[1] at 1118 H Street, N.E., Washington, D.C. Two officers went to the front door and two stayed at the back door to prevent escape from the restaurant. They had determined to go to petitioner's place of business around 4:30 p.m. on a routine search operation (Tr. 5)[2] without any warrant of arrest, not knowing who petitioner was, whether he would be there or whether he was in the United States illegally (Tr. 5-9). They had ample opportunity to secure and could have secured a warrant by telephonic authorization (Tr. 13). Petitioner was kept at his restaurant until a friend arrived to act as interpreter. Two documents were taken from him and because of their conflicting nature (one did not relate to petitioner but to a friend) the officer in charge of the detail, George Podrasky, did not know who he had and was confused all the time (Tr. 10, 14). Mr. Podrasky testified that at this point he secretly decided that petitioner might abscond (Tr. 11-12). He admitted that he arrested petitioner at the restaurant without a warrant of arrest (Tr. 6).

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[1] Petitioner purchased the restaurant around March 1, 1967. See affidavit of Lang Young dated February 15, 1968 (App. F).

[2] References are to the Immigration Transcript of Hearing of October 23, 1967.

Petitioner was required to close up his restaurant at 7:30 p.m. He was the only cook and was taken to the Washington, D.C., immigration office by four investigators (Tr. 5, 14-16). A statement was taken from him on the evening of October 12, 1967, in which he admitted birth in China, Chinese citizenship, arrival as a crewman at Philadelphia on September 20, 1966, and desertion from his vessel at New York City on September 26, 1966 (Exhibit 2, App. E). A friend, Lang Young, who had neither training nor experience as an interpreter and who would not be qualified as an interpreter in the federal courts, acted as interpreter for this confession (Exhibit 2, App. E., Affidavit of Lang Young of February 15, 1968, App. F). Later in the evening, after 8:00 p.m., petitioner was served with a warrant of arrest and order to show cause.

Upon the basis of Exhibit 2 and the information obtained as a result of the disclosures therein (Tr. 25) evidence was introduced at the petitioner's deportation hearing to establish that he was an alien who was previously deported.[3] A motion was made to suppress Exhibit 2 and the fruits of all evidence and leads obtained illegally. The motion was denied (Tr. 17) by the Special Inquiry Officer who merely stated that the evidence was not illegally obtained.

The order to show cause charged that petitioner *entered* the United States on September 20, 1966, at Philadelphia, Pennsylvania. The Special Inquiry Officer directed deportation to Hong Kong upon the basis of this entry on such date at Philadelphia (App. D).

Upon appeal to the Board of Immigration Appeals the Immigration Service contended by brief and oral argument

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[3]Petitioner did not testify at his deportation hearing. Immigration Inspector Podrasky was the only witness. Exhibit 1 was the order to show cause, Exhibit 2 was the petitioner's statement, Exhibit 3 was Form 1-95 showing that petitioner was refused entry on September 20, 1966, at Philadelphia. Exhibit 4, introduced over objection (Tr. 21) was a warrant showing deportation on November 17, 1965, of a Yam Sang Kwai.

that there was no arrest of petitioner at his restaurant, that he voluntarily accompanied the immigration officials to their office, and that it was immaterial whether petitioner reentered the United States at Philadelphia on September 20, 1966, or at New York on September 26, 1966 (Brief of Immigration Service, pp. 15, 16-18).

The Board dismissed the appeal, holding that "in view of the possession of two conflicting documents,[4] the officer was justified in believing the respondent (petitioner herein) was in the United States in violation of law and was likely to abscond before a warrant of arrest could be obtained". It further held that the petitioner's statement (Exhibit 2) and other evidence were properly admitted (App. C). Petition for review under 8 U.S.C. 1105(a) followed.

The Court of Appeals affirmed in a divided decision with each of the three judges on the panel writing a separate opinion (App. A). Each opinion recognized that aliens are protected by the Fourth Amendment against unreasonable searches and seizures. Judge Tamm writing for the majority held that petitioner was not arrested at his restaurant when it was surrounded because the record fails to show awareness by petitioner "of what transpired in the street outside," that after production of two conflicting documents by petitioner, the arresting officer Podrasky was justified in concluding that petitioner was an alien illegally here who might abscond even though Podrasky "didn't know who he had". According to Judge Tamm this was like the case of a patrolman who stops a vehicle for a traffic violation and is furnished conflicting identity documents by a driver. This opinion concludes that the evidence seized and the petitioner's affidavit admitting deportability prior to service of the arrest warrant were legally obtained.

Judge McGowan concurred stating: "I am not in a position to say, on the basis of what this record tells me, that

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[4]Petitioner had an order of supervision relating to a friend and a warrant of arrest in his own name.

the Congressional grant of authority to interrogate aliens about their status must be construed as limited to reasonable suspicions for believing that the persons approached is illegally in the country". On the bases of *Terry v. Ohio*, 392 U.S. 1 (1968) and *Camara v. Municipal Court*, 387 U.S. 523 (1967) he considered the treatment of petitioner at his restaurant, a mere detention for interrogation and not an illegal arrest.

Dissenting, Judge Wright concludes that petitioner was illegally arrested at his restaurant when investigators were posted at all doors admittedly to prevent escape. He finds that petitioner was illegally detained in his own restaurant for interrogation, that nothing in the record shows that petitioner suffered the illusion that he could leave without being accompanied by the interrogating officer, that the Fourth Amendment's protection is not confined to persons who know they have been seized, that *Terry v. Ohio*, 392 U.S. 1 (1968) did not justify the arrest for interrogation herein without a warrant, and that illegally seized evidence was improperly made the basis for the deportation order attacked by petitioner.

REASONS FOR GRANTING THE WRIT

1. The scope of appellate judicial review under 8 U.S.C. 1105(a)(4) is an issue of recurring importance. The Court of Appeals, acknowledging that the record fails to disclose whether petitioner was aware "of what transpired in the street outside," concludes on the basis of *de novo* findings unsupported by any administrative determination that no arrest occurred since he was unaware of the arresting officers outside his restaurant. This approach violates the statutory mandate of 8 U.S.C. 1105(a)(4) and is contrary to views of other Courts of Appeals. 8 U.S.C. 1105(a)(4) confines judicial review by the Court of Appeals to the administrative record and to the Attorney General's findings. Here the administrative record and the Attorney General's findings are silent as to petitioner's awareness of his blocked exits.

Contrary to 8 U.S.C. 1105(a)(4) and this Court's decisions as well as those of other circuits, *Price v. Johnston*, 334 U.S. 266, 291 (1948), *Ruckavina v. Immigration and Naturalization Service*, 303 F.2d 645 (7th Cir. 1962), the Court below infers unawareness from the silent record and the absence of any prior administrative decision. In *Price v. Johnston, supra*, this Court said: "Appellate Courts cannot make factual determinations which may be decisive of vital rights where the crucial facts have not been developed." Since lack of petitioner's awareness was crucial to the holding below, the deficiency in the record should have been supplied not by inference or *de novo* appellate findings but by an administrative remand. This is sanctioned by the statute and past judicial decisions.[5] This, the Court below, was unwilling to do. The digression below from the statutory mandate and accepted procedures, require review and correction.

2. The decision below produced three separate opinions as to what constitutes an arrest. There is disagreement as to the statutory and constitutional limits of the authority of immigration officials to arrest aliens without a warrant and without probable cause. Each of the opinions below, however, recognize that aliens are protected by the Fourth Amendment. The authority to arrest without a warrant is exercised daily and routinely throughout the United States and the scope of its legal limits presents issues of great concern to those interested in the proper administration of our immigration laws.

The majority and concurring opinions below consider the detention and arrest of petitioner at his restaurant for interrogation justified under *Terry v. Ohio*, 392 U.S. 1 (1968) first upon the basis of his alleged lack of awareness "of what was transpiring in the street outside", secondly by analogizing this detention to that of a traffic-violating

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[5]See: *Chen v. Foley*, 385 F.2d 929, 931 note (6th Cir. 1967), cert. denied 390 U.S. 952 and *Bufalino v. Immigration and Naturalization Service* No. 16736 (3rd Cir., Feb. 20, 1969).

motorist or of a suspicious person on the street about to burglarize, and thirdly upon the conclusion that possession of conflicting identity documents established probable cause that petitioner might abscond. This trichotomy of conclusions underlying the decision below is not tenable.

There can be no doubt that the protection of the Fourth Amendment extends to civil administrative action and to places of business as well as homes. *Camara v. Municipal Court*, 387 U.S. 523 (1967); *See v. City of Seattle*, 387 U.S. 541 (1967). An arrest without a warrant is presumptively invalid and the Government has the burden of establishing probable cause and its legality. *United States v. Campos*, 255 F. Supp. 853 (S.D. N.Y., 1966) *aff'd* 362 F.2d 1011, *cert. denied* 385 U.S. 988; *United States v. Blalock*, 255 F. Supp. 268 (E.D. Pa., 1966). Assuming but not conceding that the record justifies the majority conclusion as to petitioner's unawareness[6] that his restaurant was surrounded by immigration officials, we submit that such factor does not negative an arrest. Fourth Amendment protection is not dependent upon such awareness[7] as the dissenting decision observes (App. A. 29) nor has this Court indicated a contrary view in *Terry v. Ohio, supra*. Clarification of the implications of *Terry v. Ohio* and the issue which divided the court below merit certiorari.

8 U.S.C. §1357(a)(1) authorizes interrogation of any person believed to be an alien. It is an unwarranted exten-

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[6]The dissent notes that the record does not explicitly show awareness that officers were posted at the doors of his restaurant but observes that nothing in the record suggests that he was under the illusion he could leave at will (App. A. 29). The burden of proving awareness, if relevant, should have been placed upon respondent.

[7]Surrounding a small two room carry-out restaurant with intent to prevent the egress of any foreign born found therein is entirely dissimilar to the surrounding of a six story courthouse building with over one hundred rooms and no intent to prevent departure of court officials present therein. The majority opinion's chilling fears are unjustified (App. A. 19).

sion of this statute and contrary to Fourth Amendment limitations to interpret 8 U.S.C. 1357(a)(1), as did Judge McGowan (App. A. 23) to authorize detention of petitioner in his own restaurant for interrogation regardless of probable cause. This is totally dissimilar to temporary detention of suspicious characters or of traffic violating motorists on the street. Here petitioner was detained for interrogation in a small area—his restaurant with egress in all directions to the outside blocked. Here no crime on the streets was threatened. Neither public thoroughfares nor public safety were involved. Petitioner's place of business protected by the Fourth Amendment was the situs of the arrest and no emergency requiring immediate action presented itself.

8 U.S.C. 1357(a)(2) authorizes arrests without warrants but only where there is probable cause to believe that an alien is illegally here and might abscond. *United States v. Mason*, 344 F.2d 673 (2d Cir. 1965). Petitioner had two documents in his possession—one in the name of a friend was an order of supervision; the other in his own name was a warrant of arrest.

These two documents presented to Immigration Investigator Podrasky furnished no basis for an arrest under 8 U.S.C. 1357. The order of supervision (dated May 23, 1963) on its face precluded an arrest of the person involved. Under 8 C.F.R. 287.3 the purpose of arrest without a warrant is to subject the alien to a deportation proceeding. If he were under supervision, deportation proceedings had been concluded at least six months previously and the alien would not be subject to arrest. 8 U.S.C. 1252(d). See *Schrode v. Rowoldt*, 213 F.2d 810 (8th Cir., 1954); *United States v. Witkovich*, 353 U.S. 194, 198 (1957).

The other document furnished by petitioner was his own warrant of arrest dated August 4, 1965 (Tr. 9, 10, 21) in his prior deportation proceeding. This did not show the disposition of such proceeding. If the deportation proceedings initiated in 1965 were still pending and petitioner had already been arrested, no basis existed for a further arrest

to bring him before a hearing officer for a deportation hearing. See 8 C.F.R. 287.3. If on the other hand, petitioner had been deported in 1965, then information was necessary as to whether he had secured permission to reapply before it could be decided whether petitioner was legally here. As the arresting officer admitted, he needed more information (Tr. 12) to make a determination. On this record he did not know who he had nor whether he was here illegally at the time of the arrest at the restaurant. On this record, the arresting officer did not have probable cause or a reasonable basis for concluding that the petitioner, who owned the restaurant and who was surrounded by at least four immigration officers, might abscond before an arrest warrant could be issued.

Here petitioner owned his own restaurant which he was operating at the time of his arrest. He was the only cook on the premises. Absent were any indications which would give reasonable grounds to believe that petitioner would abandon his cooking, his customers, and his restaurant to flee. If petitioner was illegally arrested his statement admitting deportability (Exhibit 2) obtained during illegal detention, should have been suppressed and the deportation order based thereon cannot stand. Without Exhibit 2 alienage and deportability were not established by clear, convincing and unequivocal proof. *Woodby v. Immigration and Naturalization Service*, 385 U.S. 276 (1966). It is submitted that the resolution of the issues presented herein will affect innumerable cases, will control the daily operation and enforcement of our immigration laws and will definitely inform the Immigration and Naturalization Service and the alien in our midst of the statutory and constitutional limits of routine administrative practices.

3. The administrative record herein contains no basis for supporting deportability grounded upon a reentry at Philadelphia on September 20, 1966. This is the charge in the order to show cause (Exhibit 1) and the basis for the order of deportation herein (App. C, D). In fact petitioner was

refused entry at Philadelphia on September 20, 1966 (Tr. 19 Exhibit 3). His vessel then went on to New York City where he entered on September 26, 1966 (Exhibit 2). Obviously, no evidence sustains the charge upheld below. The variance as to dates and cities is material.[8] Petitioner's alleged reentry was a criminal violation. 8 U.S.C. 1325, 1326. Can it be doubted that the record below would not sustain an indictment containing the facts set out in the order to show cause? It should not sustain a deportation charge.

> "The history of liberty," said Justice Frankfurter, "has largely been the history of observance of procedural safeguards". *McNabb v. United States*, 318 U.S. 332, 347 (1943).

An alien seaman is entitled to procedural due process in a deportation hearing. *Sung v. McGrath*, 339 U.S. 33 (1950); *The Japanese Immigrant Case*, 189 U.S. 86 (1902). Section 242(b)(1) requires that an "alien shall be given notice, reasonable under all the circumstances, of the nature of the charges against him". This is a requirement of the statute and of due process. See *Ex parte Woo Wah Ning*, 67 F. Supp. 56 (W.D. Wash., 1946). The regulations likewise require a written statement of the charges in an order to show cause, 8 C.F.R. 242.1, and the lodging of additional charges in writing, 8 C.F.R. 242.16(d). These regulations are no mere technicalities, but have the force and effect of law. *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1953). Petitioner is entitled to notice in writing of the charges he must meet in a deportation hearing. Neither the Special Inquiry Officer nor the Board of Immigration Appeals has jurisdiction to order him

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[8] A slight variance as to a date alone would not be material. *Cogdell v. United States*, 307 F.2d 176 (D.C. Cir., 1962), cert. denied 371 U.S. 957. Here, the variance was as to dates and places and no findings were made to conform to the actual facts. We submit the variance here cannot be sustained under principles enunciated in *Berger v. United States*, 295 U.S. 78 (1935).

deported on grounds not presented to the petitioner in writing. Under these circumstances, the charges herein cannot be sustained as a matter of due process. Petitioner made no entry at Philadelphia on September 20, 1966. He may not be deported on an entirely different entry without notice in writing.

CONCLUSION

For the reasons set forth herein, certiorari should be granted.

Respectfully submitted,

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,784

YAM SANG KWAI, Petitioner

v.

IMMIGRATION & NATURALIZATION SERVICE, Respondent

Petition to Review Deportation Order of the Immigration and Naturalization Service

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Decided February 17, 1969

Mr. Jack Wasserman for petitioner.

Mr. Charles Gordon, General Counsel, Immigration & Natufalization Service, of the bar of the Supreme Court of the United States, *pro hac vice*, by special leave of court, with whom *Messrs. David G. Bress*, United States Attorney, and *Frank Q. Nebeker*, Assistant United States Attorney, were on the brief, for respondent.

Before WRIGHT, McGOWAN and TAMM, *Circuit Judges*.

TAMM, *Circuit Judge*: At about 6:00 p.m. on the evening of October 12, 1967, petitioner's place of business was surrounded by officers of the respondent with the purpose of interrogating any aliens therein. Certain officers were stationed at both the entrance and the exit. None knew of the petitioner's existence nor of the identity of any of the patrons before entering. One officer, Officer Podrasky, entered the restaurant and confronted the petitioner with certain questions concerning petitioner's right to be in the United States. Because of a language difficulty petitioner (being able to converse solely in Chinese—Foochow dialect)

sent for a friend to act as an interpreter. It should be noted that Mr. Kwai's "friend," a Mr. Lang Young, is a China-born, United States citizen having resided in this country since 1941. Mr. Young, although not a professional interpreter, certified that he had received an eighth grade education in China and that he was a qualified interpreter of Chinese–Foochow dialect. From the moment of his arrival at his friend's restaurant, he was present throughout all the proceedings here at issue up to, and including, the hearing before the Special Inquiry Officer. While waiting for Mr. Young, the petitioner went about his business of preparing food and managing his carryout shop. When the friend arrived the petitioner produced certain documents and gave them to Podrasky. One document was an order of supervision, the other, a warrant of arrest. The order of supervision (which it appears that petitioner was holding for a friend) was in the name of Yung Ing Wa. The warrant of arrest, in the name of Yam Sang Kwai, indicated that it had been issued in August, 1965, by the District Director of the New York District but had not yet been executed. However, a copy of this warrant was attached to the Service's case jacket and it reveals that the warrant was executed November 17, 1965. In that the documents conflicted as to the person named thereon and, as Podrasky did not know which document referred to the petitioner, he required the petitioner to close his restaurant and accompany him to his office. Here he was advised of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), and was sworn upon an affidavit in which he related his present status as an alien; to wit, that he was born on May 5, 1928, in Foochow, China; he is a citizen of China; he had previously been deported from the United States on November 17, 1965; he had not reapplied for admission after that date; he was not granted permission to re-enter the United States; and that he had attempted to re-enter the United States, at Philadelphia, on September 20, 1966–refused entry, and entered the United States on September 26, 1966, at New York City. This affidavit was read to petitioner by his

friend, Mr. Young. At 8:00 p.m. Mr. Kwai was served with a warrant of arrest and an order to show cause why he should not be deported. A hearing was held on October 23, 1967, on the order to show cause which charged the petitioner with having entered the United States at Philadelphia, Pennsylvania on September 20, 1966, and that he was subject to deportation on the basis that he had previously been deported and had not received permission from the Attorney General to re-enter.

At the hearing petitioner was represented by experienced counsel. A motion was made to suppress petitioner's affidavit and denied by the Special Inquiry Officer. Petitioner, upon advice of counsel, elected to remain mute. Evidence was presented showing that petitioner had previously been deported in 1965, that he sought entry at Philadelphia on September 20, 1966, and was denied, and that he re-entered the United States at New York City on September 26, 1966, without permission. At the close of the evidence the Special Inquiry Officer, prior to issuing his order, suggested that the government move to amend the order to show cause to conform with the proof. Counsel for petitioner noted that he was entitled to an adjournment in this regard. An adjournment was offered but waived by counsel, an objection to the amendment being retained. "The special inquiry officer shall advise the [petitioner] . . . that he may have . . . time within which to meet the additional . . . allegations. The [petitioner] shall be required to state *then and there* whether he desires a continuance . . . ." (emphasis supplied) 8 C.F.R. § 242.16(d) (1968). The motion to amend was made and granted. The order of deportation entered.

The petitioner appealed this ruling to the Board of Immigration Appeals and on March 19, 1968, they dismissed the appeal on the grounds that there was a waiver of written notice to make the amendment to the order to show cause since counsel had waived adjournment in that regard; that, based upon the conflicts in the two documents which

petitioner had given Podrasky, the officers were justified in arresting petitioner at the restaurant without a warrant; and that the motion to suppress petitioner's affidavit was properly denied. This appeal followed. We affirm.

The central question on this appeal is whether there was a valid arrest of the petitioner at the restaurant. In determining that issue there is one point over which there can be no dispute; that is, that *prior* to confronting petitioner in the restaurant there was no probable cause (under applicable standards as applied to the statute under which respondent must act) to arrest anyone. Since we hold that there was a valid arrest at the restaurant, what transpired prior to entering becomes critical.

It is the petitioner's contention that his initial arrest was effected at the time the restaurant was surrounded and his liberty of movement constrained. We cannot agree. "It is quite plain that the Fourth Amendment governs 'seizures' of the person which do not eventuate in a trip to the station house and prosecution for crime. . . . It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person. . . ." *Terry v. Ohio*, 392 U.S. 1, 16 (1968). Thus the Supreme Court has verbally circumscribed the outer limits of "seizure" under the fourth amendment to mean an accosting of an individual *and* a restraint of his liberty to depart. We take this to mean that a "seizure" must be personal, not general; that it must contain the element of awareness on the part of both the protagonist and the antagonist; and it must restrain the liberty of the individual to the extent that he is not free to leave. An arrest, under the fourth amendment, cannot be effected in a vacuum. There must be knowledge of the situation on behalf of both the police and the suspect. There can be no seizure where the subject is unaware that he is "seized." To hold otherwise would be to give substance to an *ex parte* arrest—a concept we must disregard. At no time, prior to

entering the restaurant, does the record indicate that any of the patrons of the restaurant was aware of what was transpiring in the street outside. The fact that they *might* have been stopped had they attempted to leave is not before us. The Supreme Court has said that "[o]nly when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen [or alien] may we conclude that a 'seizure' has occurred. . . ." (Brackets supplied.) *Terry v. Ohio, supra,* at 19, n. 16. Suppose, for example, that word of a gambling operation is received by a police officer and, with the aid of his fellows, he closes off both the entrances and exits to that building housing the operation—can it be argued, as the petitioner argues here, that should that activity be in the basement of this very courthouse, each member of the judiciary, herein, is under arrest? Yet this is the very point the petitioner seeks to make. He urges that, prior to any personal confrontation and absent any personal awareness on his part of the existence of the respondent's officials, he was under arrest. If this be true then perhaps as one sits reading this opinion in the quiet of his office he may be unknowingly under arrest. Such a contention is both chilling in its implication and absurd in its application. We therefore disregard it.

Petitioner next contends that probable cause to arrest did not exist even after the production of the conflicting documents. We cannot agree. "Any officer . . . of the Service . . . shall have power without warrant . . . to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States. . . ." 8 U.S.C. § 1357(a)(1) (1964). This statute, plain on its face, gives the officers of the respondent the authority to interrogate *any* alien as to his right to be in the United States. It does nothing more. It does not authorize interrogation of the alien concerning criminal matters, nor does it condone harassment. Officer Podrasky, upon entering the carry-out, confronted the petitioner, Yam Sang Kwai, obviously a

person of foreign descent, with questions concerning his right to be in the United States. Due to a language barrier the petitioner sent for a friend to act as an interpreter and, while waiting for him, proceeded about his business unimpaired by Podrasky. There can be no question that at this point the respondent's officer acted "reasonably" in light of his statutory authority and fourth amendment dictates. When the interpreter arrived Podrasky again inquired into petitioner's status. In reply, the petitioner produced the conflicting documents. At this point Podrasky "didn't know who [he] had," and "because of [petitioner] furnishing [Podrasky] with these two pieces of paper, [Podrasky] thought that he was likely to abscond" (Tr. 11). Podrasky then requested the petitioner to accompany him to his offices. Again respondent's officer acted within his statutory authority for he is enabled "to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of . . . law . . . and is likely to escape before a warrant can be obtained . . ." 8 U.S.C. 1357(a)(2) (1964). An apt analogy to the present issue would be where a patrolman stops a vehicle upon a traffic violation, receives conflicting documents as to the identity of the driver and thereby is given probable cause for believing that the driver has no right to be in that vehicle. We have the same situation here. The production of these documents and the facts available to Podrasky certainly would "warrant a man of reasonable caution in the belief"[1] that the petitioner was in the United States illegally and that he was likely to abscond. The arrest at the restaurant was valid. Our construction of the respondent's activities in no way vitiates the legal necessity of "probable cause" to make an arrest. We find that probable cause existed upon the receipt of the documents. This finding precludes a discussion of the suppression issues in that the evidence secured by Podrasky was incident to a lawful arrest.

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[1] Carroll v. United States, 267 U.S. 132, 162 (1925).

We turn then to the issue of whether the petitioner's affidavit was properly admitted. It is the contention of the petitioner that since the interpreter was not "qualified" by legal standards, his waiver of rights under *Miranda* was ineffective. We cannot agree. Mr. Young was a friend of the petitioner and acted in his behalf. He had been a resident in the United States since 1941. He certified that he had read the affidavit to the petitioner and that the petitioner understood him and that the statements made therein were true and correct, and he was present at the inquiry. At no time has the petitioner ever alleged that he did *not* understand his affidavit. Petitioner cites *Nieto v. McGrath*, 108 F.Supp. 150 (S.D.Texas 1951); *Ponce v. McGrath*, 91 F.Supp. 23 (S.D.Cal. 1950) and *Handlovits v. Adcock*, 80 F.Supp. 425 (E.D.Mich., 1948) in support of his position. A reading of these cases uncovers differences of fact, not of law and therefore are not applicable here. We hold there was a valid waiver of counsel and petitioner's affidavit was properly admitted.

We consider the argument of petitioner that the order to show cause was improperly amended. We cannot agree. The proceeding before the Special Inquiry Officer is essentially civil in nature. It does not take on the rigid formalities of a criminal trial. The order to show cause is not substantive evidence but a procedural safeguard with which the petitioner is notified of the charges against him in order properly to defend the allegations. Here petitioner was the best qualified person to know when he re-entered the United States and what his prior history before the Service had been. The action of the Special Inquiry Officer was to correct procedural error and not an attempt to abridge substantive rights. An adjournment was offered to trial counsel in this regard but was waived—counsel retaining a token objection. We see no error on the part of the Special Inquiry Officer in this regard.

Since oral argument of this case, petitioner has filed certain supplemental memoranda. We find nothing contained therein persuasive on the issues.

It is petitioner's position that the Board of Immigration Appeals must be reversed. We cannot agree.

Affirmed.

McGOWAN, *Circuit Judge, concurring in the result:* For the reasons stated hereinafter, I join in the result of leaving the deportation order undisturbed.

The evils of the dragnet detention for investigation in any area of law enforcement are always a legitimate area of judicial concern. But that concern may more properly be pursued at the instance of one who has clearly been detained against his will. In this case appellant did not unsuccessfully try to leave the premises. Nor does it appear that appellant was the unwilling object of a forced submission to questioning. He did not testify that he was, either by reference to the representations or conduct of the investigator who came into his restaurant, or otherwise.

The dissent argues that, because of the presence of investigators outside the restaurant, appellant was in fact such an unwilling object, although he may not have thought himself to be one at the time. All the record shows on this is that the questioning inspector, when asked whether appellant was free to leave, said "I don't know." For me there is less ambiguity in this answer than meets the eye, because it must be true that the manner of response to a question to an alien about his status can determine whether he may be detained.

If appellant here had, in response to the first request for information about his status, said that he would respond as soon as he completed some chore in the kitchen, and then had run out the back door with every appearance of a man permanently retiring from the restaurant business, it seems clear that the questioning investigator, if fleet enough to catch up with him, would have had either a reasonable suspicion adequate to detain him for further questioning or perhaps even probable cause to arrest for being in the

country illegally. The mere fact that the questioning investigator does not rely on his own ability to deal with this contingency, but instead brings along colleagues who stay outside to provide help if needed, does not without more make the approach inside the restaurant an unreasonable seizure of appellant's person within the meaning of the Fourth Amendment, at least where as here there is no indication from the record the appellant even knew of the presence of officers outside.

In terms of what actually happened inside the restaurant, the record shows only that appellant was asked to supply information about his status, and that his manner of response was completely cooperative. While waiting for his interpreter-friend to arrive, appellant was allowed freely to go about his business, including unsupervised trips to the kitchen. When communication was established, he promptly produced documents which, at the least, justified detaining him for further inquiry. I am unprepared to say that, on this record, the mere presence, unknown to appellant, of investigators outside the restaurant effected forthwith an unreasonable seizure of his person.

Appellant here does not challenge the right in the questioning investigator to approach him in the first place, although the statute is in terms limited to the interrogation of "any alien or person believed to be an alien." This limitation could obviously raise problems for a dragnet detention. Moreover, the "routine search" characterization used by the Government could certainly stand some ventilation in a case involving persons who have clearly felt its impact. Also, I share the view that there has emerged, at least in the field of familiar criminal acts, an important and discernible distinction between arrest on probable cause, and temporary detention for interrogation, with both concepts in particular applications being subject to assay under the Fourth Amendment.

I am not in a position to say, on the basis of what this record tells me, that the Congressional grant of authority

to interrogate aliens about their status must be construed as limited to reasonable suspicion for believing that the person approached is illegally in the country. There may, for all I know, be cases of illegal entry where the enforcement authorities have no way of proceeding effectively except by the direct inquiry approach to those who reasonably appear to be aliens. The constitutional issues involve, as the dissent asserts, the balancing of interests in privacy with the needs of law enforcement. This record has not seemed to me an appropriate one for the accomplishment of this delicate undertaking, especially when the only apparent analogies are those of inquiry to see whether a man is about to commit burglary, *Terry v. Ohio*, 392 U.S. 1 (1968), or has allowed his plumbing to get into a state of disrepair, *Camara v. Municipal Court*, 387 U.S. 523 (1967).

WRIGHT, *Circuit Judge*, *dissenting*: Petitioner has been ordered deported to Hong Kong, and seeks review of that order under the appropriate provisions of the Immigration and Nationality Act.[1] Because in my view the finding of deportability was based in part upon the fruit of an illegal seizure of petitioner's person, I would set the order aside.

I

Petitioner owned and operated a restaurant in the District of Columbia. On the evening of October 12, 1967, four investigators of the Immigration and Naturalization Service went to petitioner's restaurant in order to carry out what is described as a "routine search operation." Two of the investigators were stationed at the rear door, one at the front door, and the fourth entered the front door. No exits to the streets remained unguarded.

The fourth investigator attempted to question petitioner, but language difficulty apparently made communication impossible. Petitioner then sent for a friend to act as interpreter. The investigator waited, while petitioner continued

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[1] 8 U.S.C. § 1105a (1964).

to work in the kitchen. After the investigator spoke with petitioner through the interpreter, petitioner produced two documents. One was an unexecuted warrant for the deportation of petitioner, and the other was an order of supervision (a document applicable to one subject to deportation) in the name of Yung Ing Wa.

At this point the investigator asked petitioner to accompany him to the I&NS office, and told him to close his restaurant for the night. Petitioner went to the office where, after receiving a version of the *Miranda* warnings,[2] he admitted that he was an alien, that he had previously been deported from the United States, and that he had re-entered the country by jumping ship, without previously applying for admission into the United States. On the basis of the documents supplied to them at the restaurant, the investigators obtained petitioner's I&NS file, which contained the executed warrant directing his earlier deportation, and a form indicating that he had been excluded from entry into the country at Philadelphia shortly before he, according to his admission, jumped ship in New York.

At the subsequent deportation hearing, the Government submitted into evidence petitioner's statement, the executed warrant of deportation, and the form showing that he had been excluded from entry at Philadelphia. On the basis of these items and the testimony of the investigator who had questioned him at the restaurant, petitioner was found to be an alien previously excluded and deported, who had not applied for admission to the United States.[3] He was ordered deported.

[2]The I&NS has adopted the standards of *Miranda* v. *Arizona*, 384 U.S. 436 (1966), in interrogating persons held in custody during the investigative stage of deportation proceedings. *See* 1 C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE (Rev. ed.) § 5.2b (1967 Cum. Supp.); Memorandum for Respondent in Opposition to Granting Petition for Writ of Certiorari in *Ah Chiu Pang* v. *Immigration and Naturalization Service*, 3 Cir., 368 F.2d 637 (1966), *cert. denied*, 386 U.S. 1037 (1967).

[3]The statutory basis for petitioner's deportation is 8 U.S.C. § 1251 (a)(1) (1964), which provides:

[continued]

At the deportation hearing petitioner's counsel objected to the admission into evidence of the statement made at the I&NS office, on the ground that it was the fruit of an illegal arrest. The objection was overruled. In reviewing the order of deportation, the Board of Immigration Appeals upheld the admission of the statement, and relied on it to affirm the order. In my view the statement was the fruit of an illegal seizure of petitioner's person, and should not have been admitted.

When the four I&NS investigators proceeded to petitioner's restaurant, they had no knowledge of who petitioner was, whether he was an alien, or whether he was illegally in the United States. They were admittedly engaged in a "routine search operation." Before any of them entered the restaurant, they staked out its public exits. Then one of them entered and started asking questions. Petitioner contends that surrounding the building and sending an officer in to interrogate those inside constituted an arrest without probable cause, any fruits of which cannot be used in evidence.

"Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

"(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry[.]"

The Government charged that petitioner was excludable at the time of entry by virtues of 8 U.S.C. § 1182(a)(16) (1964), which provides:

"Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

* * * * *

"(16) Aliens who have been excluded from admission and deported and who again seek admission within one year from the date of such deportation, unless prior to their reembarkation at a place outside the United States or their attempt to be admitted from foreign contiguous territory the Attorney General has consented to their reapplying for admission[.]"

The Government in its brief describes the initial contact with petitioner as follows:

> "* * * Two of the investigators were posted at the rear door of the restaurant for the obvious purpose of preventing the escape of aliens illegally in the United States. It has been the experience of the Service that if an immigration officer enters a restaurant, word of his presence is quickly spread throughout the restaurant and illegal aliens seek to flee through doors or windows of the restaurant. Investigator Podrasky entered the restaurant and left another investigator outside the front door. Podrasky attempted to query the petitioner concerning his immigration status which he had the right and duty to do under * * * 8 U.S.C. 1357(a)(1), and this Court has held that the mere questioning of a suspect does not amount to an arrest. *Green* v. *United States*, 104 U.S.App.D.C. 23, 259 F.2d 180 (1958). * * *"[4]

The Government thus does not attempt to characterize the investigator's action as a simple exercise of one individual's right to ask another individual a question in a public place, at the risk of having the other individual choose to answer or walk away.[5] It rather regards the action as something requiring authorization, and it seeks that authorization in 8 U.S.C. § 1357(a)(1) (1964), which provides:

> "Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power *without warrant*—
>
> "(1) to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States[.]" (Emphasis added.)

If this provision is anything more than an empty recitation of the right of a Government agent to ask an individual a question, it must be taken as an authorization of temporary or limited detention for the purposes of interroga-

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[4] Brief for Respondent, pp. 7-8.

[5] *See Terry* v. *Ohio*, 392 U.S. 1, 32-33 (1968) (concurring opinion of Mr. Justice Harlan).

tion. The express provision eliminating the need for a warrant lends weight to this reading. Congress would not have suggested that a warrant might be needed for questioning unless it had regarded some form of search or seizure as an adjunct to such questioning.

The Government's explanation of the posting of investigators at the exits to the restaurant fully confirms that the I&NS views its statutory power to interrogate as a power to detain for interrogation. The Government brief asserts that, when I&NS investigators enter restaurants, persons "flee" through windows and doors. Officers are posted at such exits, then, to prevent such "escapes"—to detain the persons in the restaurant so they may be questioned about their immigration status. Since such "escapes" apparently take place before the investigator inside has time to ask questions and hence to focus on suspects, the purpose of the investigators at the exits is not simply "to prevent the escape of illegal aliens," but to prevent the departure of all persons who might turn out to be illegal aliens after interrogation.

The Government cites the *Green* case for the proposition that "the mere questioning of a suspect does not amount to an arrest."[6] With that proposition I have no argument. But what distinguishes "mere questioning" from detention for interrogation is that the person subjected to "mere questioning" is free to depart at any time. Here the Government has made no effort to rebut the natural inference, arising from the posting of officers at all public exits, that the persons in petitioner's restaurant were *not* free to depart. Indeed the Government asserts that those officers stood at

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[6] In *Green*, police officers called two men over to their police car for questioning. One of the men came, but the other fled into a nearby house, over the protest of the occupant of the house. The police arrested him for attempted unlawful entry, and this court held that they had probable cause for such an arrest. In the circumstances, asking the men to come to the police car was held not to constitute an arrest. *Green* v. *United States*, 104 U.S. App.D.C. 23, 259 F.2d 180 (1958), *cert. denied*, 359 U.S. 917 (1959).

the doors to prevent "escape"—a tendentious term which in the circumstances can mean little more than "departure."

Petitioner did not seek to leave, nor was he restrained from continuing with his work in the kitchen while the interpreter was sent for. Neither of these facts rebuts the proposition that he was detained. A man may be in custody without testing the bounds of that custody. A man may be free to move within a small area, but if he is restrained from going where otherwise he would have a right to go his liberty of movement is restricted.

Finally, the record does not explicitly show that petitioner was aware that officers were posted at the doors of his restaurant. On the other hand, nothing in the record suggests that he suffered the illusion that he could leave without being accompanied by the interrogating officer. Where, as here, the objective circumstances indicate that the officers were operating under apparent statutory power to detain for interrogation, I cannot assume that the person detained did not know he was detained. Nor is it true that Fourth Amendment protections extend only to persons who know they have been seized by the authorities. An unconscious or feeble-minded person may in fact be arrested without knowing it; that does not mean that evidence obtained in such an arrest is not subject to exclusion where the arrest is made without probable cause. In view of all the circumstances, I think that the officers had petitioner in limited custody when one of them entered the restaurant to question him, and that their action was subject to "[t]he right of the people to be secure in their persons * * * against unreasonable * * * seizures * * *." U.S. Const., Amend. 4.

II

With that constitutional right in mind, I would construe 8 U.S.C. § 1357(a)(1) differently from the majority in the context of this case. The statute authorizes interrogation "without warrant" of "any alien or person believed to be an alien as to his right to be or to remain in the United

States." As I have argued, the statute, unless viewed as superfluous, must be read to permit detention of persons for such interrogation in some cases. But as the Supreme Court has recently recognized, not all detentions of individuals amount to arrests, nor need they all be premised upon the "probable cause" traditionally required for arrests. *Terry* v. *Ohio*, 392 U.S. 1 (1968). Rather, where the seizure of a person is undertaken without probable cause, courts must balance "the need to search [or seize] against the invasion which the search [or seizure] entails," *id.* at 21, 22-27, in order to determine whether the search or seizure was reasonable.

In making this inquiry, I would not place too much emphasis on the clumsy and often artificial distinction between criminal and civil proceedings. The Fourth Amendment protects the security of *the people* against improper official invasion, not merely the security of criminal defendants. As the Supreme Court has recently noted: "It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior."[7]

I turn then to an examination of the competing factors as delineated by the Supreme Court: the "need to search [or seize]" and the "invasion which the search [or seizure] entails." With respect to the former, the Government has a legitimate interest in the enforcement of its immigration and nationality laws. It must take steps to insure that only those aliens are in this country whom Congress has said may be here. Enforcement of these laws doubtless requires affirmative investigation for possible violation of them. Since the presence of illegal aliens in the country may not injure or even come to the notice of the general citizenry, reliance on private complaints might permit such aliens to remain indefinitely.

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[7] *Camara* v. *Municipal Court of City and County of San Francisco*, 387 U.S. 523, 530 (1967).

However, it should be noted that analogous difficulties attend the enforcement of laws defining crimes which have no obvious victims—gambling, narcotics and sex laws, for example. And no one will contend that the public interest in the enforcement of the criminal law is less pressing than the interests protected by the immigration and nationality laws. Yet one would be hard put to argue that the Fourth Amendment requirement of particular grounds for suspicion of wrongdoing should be suspended in the enforcement of laws against crimes without victims.

Against the governmental interest in making the seizure, courts must balance its intrusiveness into "the privacy and security of individuals." *Camara* v. *Municipal Court of City and County of San Francisco*, 387 U.S. 523, 528 (1967). In *Camara* the Court sanctioned area-wide inspection of houses for health and safety defects, noting that "a routine inspection of the physical condition of private property is a less hostile intrusion than the typical policeman's search for the fruits and instrumentalities of crime." *Id.* at 530.[8] Housing inspections are imposed upon all occupants of dwellings; thus there is no stigma in being subject to one. Nor do they typically induce fear in those whose property is inspected; violations discovered usually lead to nothing worse than a warning to correct them. The limited nature of the intrusion into "privacy and security" thus justified a less particular factual basis for making the inspection.

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[8]The central thrust of *Camara* was to overrule the holding of *Frank* v. *Maryland*, 359 U.S. 360 (1959), and to require that health inspectors obtain a warrant before entering private dwellings without the consent of the occupant. But the Court also rejected the contention that such civil warrants could only issue upon a showing of probable cause that a housing code violation existed within the dwelling. The Court concluded that "area inspection is a 'reasonable' search of private property within the meaning of the Fourth Amendment," and hence that "'probable cause' to issue a warrant to inspect must exist if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling." 387 U.S. at 538.

Contrast this with the intrusion involved in an I&NS officer's interrogation of an alien. Such an interrogation can bear only one implication for the alien, his family, and his employer—he is suspected of illegal presence in the country. The interrogating officer carries with him the sanction of immediate deportation, a sanction often indistinguishable from criminal punishment in the shame and distress it brings upon those subjected to it. And often, as indeed in the case before us, immigration law violations are crimes as well as grounds for deportation.[9] Thus while a detention for interrogation may be less intrusive than a full arrest—and hence subject to a lower standard than full probable cause—it is analogous to the kind of on-the-street investigation of criminal suspects sanctioned by the Supreme Court in *Terry* v. *Ohio*, *supra*.

Thus *Terry* gives appropriate indication of the factual basis required to support a limited detention of an alien for the purpose of pursuing suspicions concerning his immigration status. In *Terry* police stopped for questioning two individuals who had been observed to walk by a shop window and look it over at least a dozen times apiece, and to confer together on the street corner between those sorties. While the Court did not explicitly approve of a forcible stop of these individuals for questioning, it did permit the observing policemen to precede a brief on-the-street interrogation with a limited frisk of the person.[10]

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[9] 8 U.S.C. § 1326 (1964).

[10] The majority of the Court in *Terry* avoided, as not squarely presented, the question whether the suspicious behavior of the petitioner justified the police officer's forcibly detaining him on the street for questioning. 392 U.S. at 19 n.16. The holding was merely that when the officer approached petitioner to question him it was reasonable to frisk him in order to safeguard against an armed attack. Justices Harlan and White in concurring opinions would have made clear that circumstances which justify a limited search of the person cannot fail also to justify a forcible stop for interrogation; in short, that the right to frisk only exists where there is a right to stop. 392 U.S. at 32-33, 34.

In a companion case to *Terry*, *Sibron* v. *New York*, 392 U.S. 40 (1968), an officer observed an individual over an eight-hour period, during which time he spoke to six or eight known narcotics addicts. When the officer approached the suspect to question him, the suspect reached in his pocket. The officer immediately thrust his hand in the suspect's pocket, and found envelopes containing heroin. Applying the standards established in *Terry*, the Court found that this limited intrusion was *not* justified by the facts known to the officer at the time.

The general standards employed by the Court to decide these cases are, I believe, useful here. The Court emphatically condemned "intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches." *Terry* v. *Ohio*, *supra*, 392 U.S. at 22. Further, it insisted that "in justifying the *particular* intrusion the police officer must be able to point to *specific* and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Id.* at 21. (Emphasis added.) Thus general or class suspicion is not sufficient; rather the officer must be able to point toward elements of the particular situation which raise a reasonable suspicion of violation of the law.

Here there is no intimation that the I&NS officers had any particular grounds for suspecting that anyone was violating any laws when they surrounded and entered petitioner's restaurant. They were engaged in a "routine search operation." They knew only that they were investigating a Chinese restaurant. We entirely ignore the letter and spirit of the Fourth Amendment when we sanction detention of an individual for interrogation by law enforcement officers on grounds no more substantial than the ethnic character of his restaurant or his own apparent race or national origin. Thus under the duty of the courts to construe federal statutes subject to constitutional standards, I would hold that the power granted by 8 U.S.C. § 1357(a)(1) to detain for interrogation "any alien or person believed to be an

alien" should be limited to cases where officers have particular grounds to support a reasonable suspicion that the person detained is illegally in the country. Since no such ground was shown in this case, I believe that petitioner was illegally detained in his restaurant during the interrogation.

Petitioner's inculpatory statement was unquestionably the fruit of the interrogation at the restaurant. The interrogation elicited the two documents, which in turn led the I&NS investigator to take petitioner to the office, where he made the statement which was received at the hearing.

It is well established that statements, as well as items of tangible evidence, which are the fruits of an illegal search or seizure cannot be admitted into evidence.[11] And the exclusionary rule bars illegally seized evidence from deportation hearings as well as from criminal trials.[12] Thus in my view petitioner's inculpatory statement, labeled Exhibit 2 in the I&NS proceedings, should not have been admitted into evidence.

I believe that the admission of petitioner's inculpatory statement into evidence was not only error, but was prejudicial. In the statement petitioner admitted all the elements establishing his deportability: that he was an alien, that he had previously been deported and excluded, that he had not subsequently applied for admission into the United States, and that he had then entered the United States.[13] The other evidence against petitioner consisted of a copy of the executed warrant for his previous deportation, and a notation of his subsequent exclusion from the country at Philadelphia.

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[11] *Wong Sun* v. *United States*, 371 U.S. 471, 485 (1963).

[12] *Klissas* v. *Immigration and Naturalization Service*, 124 U.S.App. D.C. 75, 361 F.2d 529 (1966); *Bong Youn Choy* v. *Barber*, 9 Cir., 279 F.2d 642 (1960); *cf. Bilokumsky* v. *Tod*, 263 U.S. 149, 155 (1923).

[13] *See* Note 3, *supra*.

The Government has relied upon *Klissas* v. *Immigration and Naturalization Service*, 124 U.S.App.D.C. 75, 361 F.2d 524 (1966), for the proposition that "the validity of a deportation order will be sustained notwithstanding an illegal arrest, if the order is supported by substantial evidence free of taint."[14] In *Klissas* the petitioner was deported on two separate charges: overstaying his admission as an alien seaman, and failing to submit address reports as required by law. The I&NS found him deportable on both counts. The tainted evidence in that case was relied on largely in establishing the first ground for deportation. The failure to submit reports was established by the petitioner's own admission, made some two and a half years after the improper arrest, that he had not complied with the applicable requirement. The court found that admission not to be the fruit of the illegal arrest.

Here petitioner has been ordered deported on a single charge: that he re-entered the country after being deported. The record shows that both the I&NS special inquiry officer and the Board of Immigration Appeals relied heavily upon petitioner's admission in upholding that charge. The case thus resembles *Bong Youn Choy* v. *Barber*, 9 Cir., 279 F.2d 642 (1960). In *Bong Youn Choy* an alien was ordered deported on the basis of three statements he had made indicating that he had been a member of the Communist Party. The court found that one of the statements had been obtained by coercion. Noting that "[t]he special inquiry officer * * * placed great weight on the [improperly obtained] statement," the court concluded that "[w]e cannot say whether or not, without it, the special inquiry officer would have concluded as he did," and set aside the deportation order. 279 F.2d at 647.

In *Bong Youn Choy* the determination of Communist Party membership involved conflicting testimony, whereas here petitioner stood mute at his hearing and offered no

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[14] Brief for Respondent, p. 7.

evidence in his behalf. On that ground the cases may be distinguishable. But here petitioner's admission was the chief item relied upon by the administrative agency in making its findings. I cannot conclude that the other evidence in the record provides the "clear, unequivocal, and convincing" proof necessary to support an order of deportation. *See Woodby* v. *Immigration and Naturalization Service*, 385 U.S. 276, 286 (1966).

In declining to vote for affirmance on the basis of the untainted evidence in the record, I am influenced by the nature of the error which in my view was committed. Petitioner's Fourth Amendment rights were violated. The exclusionary rule, as applied to evidence obtained through illegal searches and seizures, is designed primarily to deter improper official conduct. That purpose is not served if the courts too readily find that the introduction of such evidence is harmless error. The Supreme Court has recently taught us that where constitutional error is committed in a criminal trial, the state must "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman* v. *California*, 386 U.S. 18, 24 (1967). The rule was obviously fashioned with jury trials in mind, and it may be that it does not apply with full rigor to deportation hearings. However, it expresses the principle that error in proceedings affecting the personal liberty of individuals cannot lightly be assumed not to have affected the outcome of those proceedings. With that principle in mind, I believe that the order of deportation against petitioner should be set aside.

I respectfully dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA CIRCUIT
SEPTEMBER TERM, 1968

[Filed Feb. 17, 1969] No. 21,784

YAM SANG KWAI,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITION FOR REVIEW OF DEPORTATION ORDER OF THE IMMIGRATION AND NATURALIZATION SERVICE.

Before: WRIGHT, McGOWAN, and TAMM, Circuit Judges.

This case came on to be heard on the record from the Immigration and Naturalization Service, and was argued by counsel. Petitioner was allowed to file a supplemental memorandum after argument.

ON CONSIDERATION THEREOF, It is ordered and adjudged by this Court that the Order of the Immigration and Naturalization Service on review herein be, and it is hereby, affirmed.

PER CURIAM

For the Court:

Dated: February 17, 1969.

Nathan J. Paulson
Clerk

Opinion by Circuit Judge Tamm,
Separate opinion by Circuit Judge McGowan concurring in the result,
Separate dissenting opinion by Circuit Judge Wright.

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE
Board of Immigration Appeals

File: A-15950259 - Washington, D.C. Mar. 19, 1968

In re: YAM SANG KWAI

IN DEPORTATION PROCEEDINGS

APPEAL

ORAL ARGUMENT: February 7, 1968

On behalf of respondent: Jack Wasserman, Esq.
Warner Building
Washington, D.C. 20004
(Brief filed)

On behalf of I&N Service: Irving A. Appleman
Appellate Trial Attorney
(Brief filed)

CHARGES:

Order: Sec. 241(a)(1), I&N Act (8 USC 1251(a)(1)) - Excludable at entry, previously excluded, no permission to reapply within year

Sec. 241(a)(1), I&N Act (8 USC 1251(a)(1)) - Excludable at entry, previously deported, no permission to reapply (as amended)

Lodged: None

APPLICATION: Termination of the proceedings; in the alternative, voluntary departure

The case comes forward on appeal from the order of the special inquiry officer entered October 23, 1967 finding the respondent deportable on the charge stated in the Order to Show Cause, as amended, denying voluntary departure and ordering respondent deported to Hong Kong.

At the hearing respondent remained mute upon advice of counsel. The Order to Show Cause alleges that the respondent is a native and citizen of China who entered the United States at Philadelphia, Pennsylvania on or about Sep-

tember 20, 1966; that he was arrested and deported from the United States on November 17, 1965 at Honolulu, Hawaii; that he did not receive consent from the Attorney General to apply for readmission to the United States; and that he was found in the United States on October 12, 1967. The Order to Show Cause charged that respondent was deportable under Section 241(a)(1) of the Act, in that, at time of entry he was within one or more of the classes of aliens excludable by law existing at the time of such entry, to wit, aliens who have been excluded from admission and deported and who again seek admission within one year from date of such deportation, consent to reapply for admission not having been granted by the proper authority, under Section 212(a)(16) of the Act. Prior to rendering his decision the special inquiry officer permitted an amendment of the charge of deportability against the alien as one who has been previously arrested and deported, in whose case consent to reapply for admission has not been granted by the proper authority.

Counsel objected to the amendment or proposed amendment, alleging it came after the close of the hearing. The special inquiry officer properly ruled that the hearing had not been closed inasmuch as he had not yet rendered a decision in the case. Counsel then stated that under the rules he was entitled to an adjournment. The special inquiry officer agreed that he was so entitled but counsel waived the adjournment.

It is believed that counsel has not been harmed nor misled by the amended charge. The same factual allegations of the Order to Show Cause are used, only the technical wording of the charge has been changed to conform to the factual allegations. Counsel did not object that the additional charge was not lodged in conformity with 8 CFR 242.16(d). His only objection was that the charge was amended after the close of the hearing whereas the hearing had not as yet been closed inasmuch as a decision had not been rendered. Counsel waived the adjournment to which he was entitled, and

therefore appears to have acquiesced in the propriety of amending the charge in the Order to Show Cause. The record, in the form of Exhibits 2, 3 and 4, establishes deportability.

Counsel alleges that the arrest of the respondent without a warrant was illegal and that the documents taken from him and the affidavit (Ex. 2) executed by him should be suppressed. Immigration Investigator Podrasky testified that he and three other investigators, later joined by two others, made a routine search operation of the premises operated by the respondent as a restaurant. Investigator Podrasky stated there was no need to carry a warrant of arrest because they had no information about the alien being here illegally until he got to the restaurant; that the respondent was present with his bookkeeper with whom he could not communicate. The respondent called a friend who acted as an interpreter. While waiting for the friend to arrive the respondent continued working. The investigator testified that the respondent furnished two pieces of paper, one an executed warrant of arrest in the respondent's name; the other, a Form I-220B, an Order of Supervision in the name of Yung Ing Wa (phonetic). The investigator testified that because of the production of these two documents in different names he did not know whom he had and he then made a determination that the respondent might abscond. He then asked the respondent to come to the immigration office where he executed the affidavit, with the same friend of the respondent acting as interpreter. Upon the basis of this affidavit the investigator applied for and received a warrant of arrest and Order to Show Cause which were served upon the respondent at about 8:00 p.m. of the same evening of October 12, 1967. Subsequent to the issue of the Order to Show Cause and warrant of arrest, the investigator obtained from the New York office the respondent's file which contains Hong Kong Seaman's Identity Book No. 47427; a Form I-195 showing the refusal of admission of the respondent on September 20, 1966 at the port of Philadelphia (Ex. 3); and a warrant of deportation relating to the respondent

showing his deportation from the United States on November 17, 1965 from the port of Honolulu (Ex. 4).

Counsel contends that the respondent's arrest was illegal because it was accomplished without a warrant. Section 287(a)(1) of the Immigration and Nationality Act (8 USC 1357(a)(1)) states that any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States. It is clear that this provision was ample authority for the interrogation of the respondent.

Section 287(a)(2) of the Immigration and Nationality Act (8 USC 1357(a)(2)) authorizes the arrest of any alien in the United States if the officer has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest, but the alien arrested shall be taken without unnecessary delay for examination before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States. When as the result of interrogation the respondent produced two different types of documents, an unexecuted warrant of arrest in the respondent's name referring to an arrest April 18, 1965 and an Order of Supervision (Form I-220B), in another name, Yung Ing Wa, the immigration officer did not know whom he had, thought the respondent likely to abscond because of the conflicting documents, asked him to come to his office where the same friend of the respondent was used as an interpreter. There can be no doubt that the respondent understood the interpreter and the answers are fully responsive. The investigator took an affidavit and obtained an Order to Show Cause and warrant of arrest, which were duly served about eight o'clock of the same evening as the commencement of the interrogation. Under the circumstances, in view of the possession of two conflicting documents, the officer was justified in believing

that the respondent was in the United States in violation of law and was likely to escape before a warrant of arrest could be obtained. The Order to Show Cause and warrant were obtained after the respondent had been taken without unnecessary delay for examination before a Service officer.[1] We therefore believe that the arrest was not illegal and that the respondent's affidavit and other evidence were properly admissible in evidence under 8 CFR 242.14(c).[2]

Inasmuch as the respondent remained mute upon advice of counsel, the special inquiry officer denied the privilege of discretionary relief of voluntary departure. Since the respondent must establish eligibility for discretionary relief, the special inquiry officer's denial of such relief under the circumstances was proper.

ORDER: It is ordered that the appeal be and the same is hereby dismissed.

Chairman

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[1] *Matter of Chen Chin Ding,* Int. Dec. 1833 (February 6, 1968); *United States v. Alvaredo,* 321 F.2d 336 (2d Cir. 1963); *Pinero-Lopez v. Kennedy,* 293 F.2d 540 (D.C. 1961), cert. den. 386 U.S. 866; *Diogo v. Holland,* 243 F.2d 571 (3rd Cir. 1957); *Tsimounis v. Holland,* 132 F.Supp. 754 (E.D. Pa. 1955).

[2] Cf. *Shing Hang Tsui v. Immigration and Naturalization Service,* No. 16246 (7th Cir. January 31, 1968).

APPENDIX D

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

File: A15 950 259 - Washington, D. C.

In The Matter Of	)	
YAM SANG KWAI	)	IN DEPORTATION
	)	PROCEEDINGS
Respondent	)	

CHARGE:

I & N Act - Section 241(a)(1) (8 USC 1251(a)(1)) - Excludable at entry, previously deported, no permission to reapply

APPLICATION:

Termination of the proceedings; in the alternative, voluntary departure

IN BEHALF OF RESPONDENT:

Jack Wasserman, Esquire
902 Warner Building
Washington, D. C.

IN BEHALF OF SERVICE:

Paul M. Kelley
Acting Trial Attorney
Washington, D. C.

ORAL DECISION OF THE SPECIAL INQUIRY OFFICER ENTERED OCTOBER 23, 1967

Respondent is a 39-year-old male. The Order to Show Cause alleges that he is a native and citizen of China who entered the United States at Philadelphia, Pennsylvania on or about September 20, 1966; that he was arrested and deported from the United States on November 17, 1965, at Honolulu, Hawaii; that he did not receive consent from the Attorney General to apply for readmission to the United States; that he was found in the United States on October 12, 1967.

Deportability is charged under section 241(a)(1) of the Immigration and Nationality Act against the respondent as a person who was excludable at entry as an alien who has been previously arrested and deported, in whose case consent to reapply for admission has not been granted by the proper authority. (The charge was amended at the hearing on motion of the Acting Trial Attorney, over counsel's objection.)

On advice of counsel, respondent remained mute. The Service introduced in the record several documents which have been identified as exhibits 2, 3, and 4, and Investigator George Podrasky of the Washington District Office also testified on behalf of the Service. The documents which are in the record include an affidavit executed by the respondent, a Form I-95A, and an executed Warrant of Deportation. Investigator Podrasky identified the respondent as the person from whom the affidavit (exhibit 2) was taken. In the affidavit the facts given by the respondent establish alienage and deportability as charged in the Order to Show Cause. The affidavit shows on its face that respondent was afforded the safeguards to which he was entitled under the statute, the regulations, and the decisions.

Investigator Podrasky testified that four investigators went to the restaurant owned and operated by the respondent about 7:15 at night; that the respondent was questioned; that he turned over to the investigator two documents which showed two different names; that thereafter respondent was asked to go to the Immigration Office, where the affidavit was executed by him and where the investigator applied for and received a Warrant of Arrest and an Order to Show Cause which were then served on the respondent. There were four investigators at the restaurant, two of whom were at the back door and two at the front door. The respondent, through counsel, moved to suppress all the evidence given by the Government in the case on the ground that it was illegally obtained and in violation of the respondent's constitutional rights. I do not find that the evidence in the case was illegally obtained. I have therefore introduced it

in the record and given it full weight. The documents and the testimony establish alienage and deportability as charged.

The respondent applied for voluntary departure. However, he refused to testify in connection with that application. In connection with an application for discretionary relief, the burden of proof to establish eligibility is upon the respondent. Because of his silence, the respondent has failed to establish eligibility for voluntary departure and that relief will be denied.

The respondent has designated Hong Kong as the country to which deportation should be affected.

ORDER: IT IS ORDERED that the respondent be deported to Hong Kong on the charge contained in the Order to Show Cause, as amended.

/s/ Herman L. Bookford
Herman L. Bookford
Special Inquiry Officer

APPENDIX E

Form I-215B
(8-2-66)

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE
RECORD OF SWORN STATEMENT IN AFFIDAVIT FORM

AFFIDAVIT

IN RE: Sang Kwai Yam FILE NO. A 15 950 259
EXECUTED AT Washington, D. C. DATE October 12, 1967
Before the following officer of the U.S. Immigration and Naturalization Service G. G. Podrasky in the Foochow dialect of the Chinese language. Interpreter Lang Young used.

I, Sang Kwai Yam, acknowledge that the above-named officer has identified himself to me as an officer of the United States Immigration and Naturalization Service authorized by law to administer oaths and take testimony in connection with the enforcement of the Immigration and Nationality laws of the United States. He has informed me that he desires to take my sworn statement as I am suspected of being illegally in the United States. He has told me that my statement must be freely and voluntarily given and has advised me of these rights:

"You have the right to remain silent.

Anything you say can be used against you in court.

You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning.

You have this same right to the advice and presence of a lawyer, even if you cannot afford to hire one. We have no way of furnishing you a lawyer, but one will be appointed for you, if you wish, if and when you go to court.

If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer."

I am willing to make a statement without anyone else being present. I swear that I will tell the truth, the whole truth, and nothing but the truth, so help me, God.

Being duly sworn, I make the following statement:

My name is Sang Kwai Yam. I was born on May 5, 1928, in Foochow, China. I am a citizen of China. My father and mother never lived in the United States and they did not become citizens of the United States.

I came to the United States the last time on September 20, 1966 on the S/T Pacific Satellite at Philadelphia, Penna. I was a mechanic on the ship. I was not allowed to get off the ship. I left the ship on or about September 26, 1966, in New York City.

I was deported from the United States on November 17, 1965, from Honolulu, Hawaii. I travelled from Honolulu to Hong Kong by Pan American Airways. I did not apply for admission into the United States after I was deported. I was not granted permission to enter the United States after being deported.

/s/ Sang Kwai Yam

Subscribed and sworn to before me this 12th day of October, 1967, at Washington, D. C.

/s/ G. G. Podrasky

I certify that I am qualified to act as an interpreter in the English and Chinese (Foochow dialect) languages. I further certify that I read the foregoing to Sang Kwai Yam and he then stated that he understood me and that the statements were true and correct.

/s/ Lang Young

APPENDIX F

AFFIDAVIT

CITY OF WASHINGTON)
) SS:
DISTRICT OF COLUMBIA)

LANG YOUNG, being duly sworn, deposes and says:

1. I am an American citizen residing at 1557 Benning Road, N. E., Washington, D. C. I am a restaurant owner by occupation.

2. I had an 8th grade education in China and in the United States where I have resided since 1941, I have only had a formal education of a few months at night school.

3. I am not a professional interpreter and would not be qualified as an interpreter in the United States federal courts. I was called to interpret for Sang Kwai Yam on the evening of October 12, 1967, because the official interpreter of the Immigration and Naturalization Service was not available.

4. Sang Kwai Yam is the owner of the Zanzibar Restaurant located at 1118 H Street, N. E., Washington, D.C. He purchased this restaurant about March 1, 1967, and Hamilton Moy of Washington, D. C., was his attorney at the time of settlement.

/s/ LANG YOUNG

Subscribed and sworn to before me this 15th day of February, 1968.

/s/ H. Edward Choyick
NOTARY PUBLIC, D. C.